SUPREME COURT, U. S.

FILED

OCT 30 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1889

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, AND GEORGIA M. WHITLOCK,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

R. EUGENE MCGANNON
1100 Commerce Bank Building
Kansas City, Missouri
Counsel for Petitioners

Of Counsel:
PHILIP J. ERBACHER
1100 Commerce Bank Building
Kansas City, Missouri 64106

R. L. MIDKIFF, Inc., 916 Cherry Street, Kansas City, Mo. 64106, 421-8080

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1889

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, AND GEORGIA M. WHITLOCK,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray, pursuant to Rule 58.2 of this Court, that this Court grant rehearing of its order of October 15, 1974, denying the Petition for Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed herein by the Petitioners, restricted to the *single issue* of question 1 presented in the Petition for Certiorari (page 2 of petition) as follows:

> "1. Whether, by reason of plain and explicit wording of Section 951(d) of Internal Revenue Code of 1954, Title 26, U.S.C., a United States shareholder who, for his taxable year, is subject to tax under Section 551(b) of said Revenue Code, relating to foreign personal holding company income included in gross income of United States shareholders, on income of a

controlled foreign corporation is required to include in his gross income, for such tax year, any amount under Subsection (a) of Section 951 of Internal Revenue Code of 1954 relating to inclusion in gross income, by shareholders of controlled foreign corporation, of pro rata share of increase in investments in U.S. property by controlled foreign corporation."

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

At time that petition for certiorari was filed herein by petitioners and at time that brief in opposition thereto and reply to such brief in opposition were filed, there was no recent decision of a Court of rank equal to the Court of Appeals for the Tenth Circuit contrary to the decision of said court below in 494 F.2d 1297, specifically on the issue of the correct application of Section 951(d) IRC 1954.

However, on June 3, 1974, a refund action suit was filed in the United States Court of Claims, Washington, D. C., a court of national jurisdiction, entitled *W. R. Lovett* v. *United States*, Docket 191-74, seeking refund of income tax claimed to be overpaid by plaintiff. At paragraph 35 of the complaint in said refund action, the identical claim was made as is involved in question 1, page 2 of petition for certiorari herein, in the following language, from the *Lovett* suit:

> "35. Since for the taxable year 1963, Plaintiff is subject to tax under Section 551(b) of the Code on income of Honduras Shipping Co., S.A., plaintiff is not required under the provisions of Section 951(d) of the Code, to include in gross income, for the taxable year 1963, any amount under section 951(a) of the Code with respect to Honduras Shipping Co., S.A."

Cases in the Court of Claims may be reviewed by the Supreme Court by one of two methods (Title 28, U.S.C. 1255): by writ of certiorari granted on petition of the United States or the claimant; or, by certification of any question of law by the Court of Claims in any case as to which instructions are desired, upon which certification the Supreme Court may give binding instructions.

Thus, if the Court of Claims concludes to follow the decision of the Tax Court in 59 TC 490 (13 judges for taxpayer, 3 judges dissenting), in *Whitlock* on the Section 951(d) issue, or alternately certifies the question to the Supreme Court, the Supreme Court will be confronted with the same issue as is raised in question 1. above. Additionally, certiorari will be granted from any decision adverse to the Government on this issue in the Court of Claims (*United States* v. *Estate of Grace*, 395 U.S. 316, 89 S.Ct. 1730, opinion of six members of the Court). Further, the United States Tax Court in *Golsen*, 54 TC 742, has held that it will follow decisions of a Court of Appeals *only* in cases where appeal from a decision of the Tax Court lies to the Court of Appeals *for the same Circuit* within which the decision adverse to the Tax Court decision was granted. The Tax Court (a Court of national jurisdiction) has stated in *Golsen*, 54 TC 742, l.c. 757:

> "We shall remain able to foster uniformity by giving effect to our own views in cases appealable to courts whose views *have not yet been expressed.*" (Emphasis added)

Thus, as it now stands, both the Tax Court and the Court of Claims are free to follow views adverse to the views of the Court of Appeals for the Tenth Circuit in *Whitlock*, 494 F.2d 1297. In this connection, it should be noted that the Court of Appeals in *Whitlock* below stated at l.c. 1300:

"However, the wording can be construed, *with no difficulty at all,* to also immunize the other event included in section 951(a) which would otherwise be included in the shareholder's gross income—the pro rata share of the increase in earnings invested in United States property." (Emphasis added)

CONFLICT WITH VIEWS OF DECISION OF SUPREME COURT IN FOURCO GLASS CO. v. TRANSMIRRA PROD. CORP. ON THE PRIORITY TO BE GIVEN TO A SPECIFIC STATUTE VERSUS A GENERAL PROVISION OF STATUTE

In addition, the decision below on the application of Section 951(d) IRC 1954 is in conflict with the views of the Supreme Court noted in *Fourco Glass Co.* v. *Transmirra Prod. Corp.,* 353 U.S. 222, 77 S.Ct. 787 (case not cited before), l.c. 228:

"In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.' * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

Thus, under *Fourco Glass Co.,* even though Section 951(a)(1)(B) would otherwise cause taxation to the shareholders of Whitlock Oil Services, Inc. of earnings invested in U.S. property, the *specific* terms of Section 951(d), which *matches* in language the *specific* terms of Section 951(c), control over general terms of Section 951(a)(1)(B) (*Fourco Glass Co.* v. *Transmirra*).

In this connection, it is noted in *"Supreme Court Practice"* by Stern and Gressman, (BNA-1969 Edition) page 154:

> "A well established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court."

By the terms of Rule 58 petitioners are limited to grounds outlined in Rule 58.2 in this petition for rehearing. Neither the pendency of the case in *Lovett* v. *United States,* Docket No. 191-74, Court of Claims, and the rules of the Court of Claims, nor the Tax Court policy on decisions of a Court of Appeals, nor the decision in *Fourco Glass Co.* v. *Transmirra,* or *United States* v. *Estate of Grace* above have previously been called to the Court's attention. Nor has the request for certiorari been previously restricted solely to *question 1 at page 2 of petition* heretofore filed.

EQUITABLE ASPECTS

It is pointed out to the Court that an ultimate decision of the Court of Claims consistent with the position of petitioners herein, followed by a later grant of certiorari by the Supreme Court in the *Lovett* litigation will be of no value to the petitioners herein, since by that time the decision of the Tenth Circuit Court of Appeals below will have become final leaving the petitioners no defense to a claim for money estimated to be in the area of a quarter of a million dollars. Petitioners' counsel have been advised by local counsel that such a situation will leave the widow, Gloria M. Whitlock, penniless and dependent, an inequitable result in view of the terms of Section 951(d) IRC 1954.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari filed, *question 1, page 2 of petition,* and *pages 4 through 9* and *pages 12 through 18* (first two paragraphs) of petition filed, and *pages 1-3* of petitioners' brief in reply to opposition, it is respectfully urged that rehearing of order of denial be granted and that, upon such a rehearing, the order of denial be vacated and the petition for certiorari to the United States Court of Appeals for the Tenth Circuit, *limited to question 1, page 2 of petition* heretofore filed, be granted for the reasons noted.

Respectfully submitted,

R. EUGENE McGANNON

R. EUGENE McGANNON
1100 Commerce Bank Building
Kansas City, Missouri 64106
Counsel for Petitioners

Of Counsel:
PHILIP J. ERBACHER
1100 Commerce Bank Building
Kansas City, Missouri 64106

CERTIFICATE OF COUNSEL

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to grounds set forth in Rule 58.2 of this Court.

R. EUGENE McGANNON

Counsel for Petitioners